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No. 83-2083

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT LYONS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Whether the insanity defense recognized in federal courts should encompass, in addition to a cognitive component exculpating one who as a result of mental disease or defect is unable to appreciate the wrongfulness of his conduct, a volitional component, exonerating one who, because of such mental illness, lacks capacity to conform his conduct to the requirements of the law.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. A16-A41) is reported at 731 F.2d 243.[1] The opinion of the court of appeals panel (Pet. App. A1-A13) is reported at 704 F.2d 743. The opinion of the district court (Pet. App. A42-A53) is unreported.

JURISDICTION

The judgment of the en banc court of appeals was entered on April 16, 1984. The petition for a writ of certiorari was filed on June 15, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]A supplemental dissenting opinion by Judge Rubin, issued on August 13, 1984, is not yet reported.

STATEMENT

After a bench trial on stipulated facts in the United States District Court for the Eastern District of Louisiana, petitioner was convicted on 12 counts of securing narcotics by fraud, in violation of 21 U.S.C. 843(a)(3) and 18 U.S.C. 2. He was sentenced to concurrent terms of one year's imprisonment on Counts 1 through 6 and to five years' probation with the requirement that he participate in a drug treatment program on Counts 7 through 12. A panel of the court of appeals reversed on the ground that the district court had improperly denied petitioner an opportunity to present an insanity defense based on his drug addiction (Pet. App. A1-A13). The court of appeals granted the government's petition for rehearing and decided to consider the case en banc. Upon rehearing the en banc court remanded for a new trial under a reformulated insanity defense standard.

1. Prior to trial petitioner, the former sheriff of Washington Parish, Louisiana, informed the prosecution that he intended to rely on an insanity defense based upon his drug addiction. In response to the government's motion in limine, the district court excluded evidence of petitioner's drug addiction,ruling that drug addiction does not constitute a mental disease or defect that would support an insanity defense (Pet. App. A42-A52). Petitioner objected to this ruling and made an offer of proof specifying the evidence he would rely upon in support of his insanity defense.

The offer of proof is set forth verbatim in the court of appeals panel's opinion (Pet. App. A3-A9). It was alleged that between May and November 1978 petitioner was hospitalized on five different occasions for various ailments (*id.* at A3-A4). While in the hospital he was given substantial quantities of Percodan, Demerol and Mepergan (*ibid.*). Upon his discharge, petitioner's doctor gave him a prescription for Percodan to take as needed for pain (*id.* at A4-A5).

According to petitioner's proffer, at the end of 1978 or the beginning of 1979, when petitioner's regular physician became concerned about the possibility of addiction and refused to prescribe Percodan any longer, petitioner became a patient of Dr. Glenn Hebert (Pet. App. A5). Dr. Hebert prescribed Percodan in increasing amounts during 1979 and advised petitioner that he need not be concerned about the drug (*ibid.*). In early 1980, after petitioner was elected to the office of sheriff, he developed severe headaches for which Dr. Hebert prescribed Talwin tablets (*ibid.*); subsequently, petitioner took Talwin by injection (*id.* at A6). Toward the end of 1980 Dr. Hebert began to supply petitioner with Demerol injections (*ibid.*).

Finally, after petitioner's wife and family physician spoke to Dr. Hebert about petitioner's drug problem, Hebert put a fake cast on petitioner's leg so that he could claim his leg was broken and justify his drug consumption (Pet. App. A6). In October 1980 Dr. Hebert suggested that petitioner ask local doctors to write prescriptions for drugs on the pretense that they were needed by the sheriff's office for use in undercover narcotics investigations (*ibid.*), and petitioner followed this suggestion (*id.* at A7). At the beginning of 1981, petitioner's family twice had him hospitalized so that he could be detoxified, but his use of Demerol continued to increase (*ibid.*). Subsequently, however, when news of petitioner's drug addiction became public and the duped physicians no longer supplied him with narcotics, petitioner was successfully detoxified and weaned from his addiction (*id.* at A8).

In addition to evidence to support the foregoing factual allegations, petitioner also offered to present expert witnesses who would testify that his drug addiction affected his brain both physiologically and psychologically. He offered to prove that, as a result of his condition, he lacked substantial capacity to conform his conduct to the requirements of law (Pet. App. A8-A9).

Following the district court's rejection of his insanity defense, petitioner waived his right to a jury trial. He stipulated that " 'the evidence to be offered by the government in the trial of [the] matter would support a finding of guilt' " (Pet. App. A2; citation omitted).

A panel of the court of appeals reversed petitioner's conviction (Pet. App. A1-A13). The panel observed initially that the standard governing the insanity defense established by applicable circuit precedent was whether " 'at the time of [the offense], as a result of mental disease or defect, [the defendant] lack[ed] substantial capacity either to appreciate the wrongfulness of his conduct, *or to conform his conduct to the requirements of law*' " — *i.e.*, the American Law Institute's Model Penal Code formulation (*id.* at A10, quoting *Blake* v. *United States*, 407 F.2d 908, 916 (5th Cir. 1969); emphasis added by *Lyons* panel). The panel also felt constrained by circuit precedent (*United States* v. *Bass*, 490 F.2d 846 (5th Cir. 1974)) to hold that "involuntary" drug addiction — *i.e.*, addiction that is iatrogenic in its inception — may constitute a mental disease or defect bearing on the defendant's criminal responsibility (Pet. App. A10). Accordingly, the panel concluded that petitioner should have been allowed to submit his iatrogenic addiction defense to a jury (*id.* at A12). The panel remarked that it had "no occasion to determine whether voluntary drug addiction constitutes a defense" (*ibid.*).

3. On rehearing, the en banc court held that drug addiction by itself may never constitute a mental disease for legal purposes (Pet. App. A21-A22). Nevertheless, the court concluded that the evidence offered by petitioner should have been admitted to the extent that it tended to show that his drug addiction caused physiological damage to his brain and that a mental disease or defect resulted from this organic injury (*id.* at A24). In framing its remand, the en banc court also overruled its prior decision in *Blake* insofar

as it had there adopted the so-called "volitional prong" of the Model Penal Code formulation of insanity defense. The court of appeals adhered, however, to the cognitive component of the Model Penal Code test for legal insanity.

Relying in part upon a recent position paper of the American Psychiatric Association,[2] the court of appeals explained that most psychiatrists no longer believe that they possess "sufficient accurate scientific bases for measuring a person's capacity for self-control or for calibrating the impairment of that capacity" (Pet. App. A26). The en banc court also observed (*id.* at A27) that the volitional prong of the insanity defense creates substantial and undue risks of "fabrication" and of erroneous application, and that "psychiatric testimony about volition is more likely to produce confusion for jurors than is psychiatric testimony concerning a defendant's appreciation of the wrongfulness of his act." In addition, again citing the Psychiatric Association position paper, the court noted (*ibid.*) that "there is considerable overlap between a psychotic person's inability to understand and his ability [*sic*] to control his behavior" and that "[m]ost psychotic persons who fail a volitional test would also fail a cognitive test, thus rendering the volitional test superfluous for them." Finally, the court expressed concern that, "in view of the present murky state of medical knowledge," proving beyond a reasonable doubt — the government's burden under *Davis* v. *United States*, 160 U.S. 469 (1895) — that a defendant was not unable to control his behavior is an "all but impossible task" (Pet. App. A27-A28). Although the insanity defense offered by petitioner had been predicated on the volitional aspect of the defense, rather than the cognitive branch, the court of appeals remanded the case for a new trial in order to afford

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[2] *American Psychiatric Association Statement on the Insanity Defense* (1982).

petitioner an opportunity to frame a defense based on brain damage resulting from drug addiction under the reformulated standard (*id.* at A29).[3]

ARGUMENT

Petitioner contends that the court of appeals erred in reformulating the insanity defense. Petitioner does not quarrel with the reasons given by the court of appeals for its ruling, however. Instead, he argues that abandonment of the volitional prong of the Model Penal Code test for legal insanity effects a denial of constitutional rights and urges that the decision below is contrary to decisions of other courts of appeals. The decisions of this Court, however, make clear that recent formulations of the insanity defense

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[3]Seven members of the court of appeals joined in the opinion of the en banc court. Judges Rubin and Williams jointly filed an opinion concurring in part and dissenting in part that was joined by three other members of the court. These judges agreed with the majority that narcotics addiction standing alone, whether iatrogenic in origin or otherwise, cannot be considered a mental disease or defect for purposes of the insanity defense (Pet. App. A30-A34), but did not agree that petitioner had preserved the argument that his offer of proof was intended to establish a claim of drug induced physiological injury causing a mental disease or defect (*id.* at A34-A35). These judges accordingly saw no reason to remand the case for retrial, and no reason to consider any redefinition or refinement of the insanity defense (*id.* at A34-A37). Judge Johnson dissented from the terms of the court of appeals' remand (Pet. App. A37-A41). He noted "agreement with many of the concerns stated by [the majority] concerning the existing insanity defense," acknowledging that "the present insanity test may be too broad," that the "abolition of the volitional prong might more properly limit the insanity inquiry," and that the court of appeals' action would "align the insanity defense * * * with the current view of the psychiatric school of thought" (*id.* at A40-A41). But he argued that en banc reconsideration of the subject was inappropriate because proposals to reform the insanity defense were pending in Congress. Subsequent to the filing of the petition, Judge Rubin, joined by Judge Tate, filed an additional dissent advocating retention of the volitional prong of the insanity defense.

such as the one modified by the court below are not constitutionally mandated. In light of the current public debate and professional controversy regarding the proper role and scope of the insanity defense it is not "yet the time [for this Court] to write into the Constitution" immutable formulas defining legal insanity, which would inevitably "reduce, if not eliminate * * * fruitful experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold" (*Powell* v. *Texas*, 392 U.S. 514, 536-537 (1968) (opinion of Marshall, J.)).

1. We note at the outset that further review at this juncture is unwarranted because of the interlocutory posture of the case. The court of appeals simply vacated petitioner's conviction and remanded the case for a new trial under the reformulated insanity defense it adopted. Of course, petitioner may be acquitted on retrial if the evidence gives rise to a reasonable doubt as to whether his drug addiction caused organic brain damage that rose to the level of a mental disease or defect having the requisite causal nexus to his unlawful acts. If petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present the instant claim to this Court together with any other claims he may then have.

2. Further review in this case is unwarranted for the additional reason that it is by no means certain that petitioner's guilt or innocence turns on the court of appeals' reformulation of the test for legal sanity. Under both the Model Penal Code standard and the revised standard articulated by the court of appeals, a defendant must establish as a threshold matter that, at the time of the offense, he was suffering from a legally cognizable mental disease or defect. It is not at all apparent that petitioner will be able to do so, and the issue of what kind of effect such a disease or defect

must be shown to have upon a defendant raising the insanity defense — the only question presented by the petition — may accordingly prove to be totally academic in this case.

Petitioner's insanity defense was predicated upon the claim that his " 'drug addiction was a mental disease or defect' " (Pet. App. A8, quoting petitioner's offer of proof). The en banc court of appeals squarely rejected this claim, correctly noting that its decision was consistent with those of the other courts of appeals that have considered the issue (see Pet. App. A19, citing cases).[4] The majority of the court of appeals nonetheless allowed petitioner a new trial because it read petitioner's offer of proof to encompass an additional claim — *i.e.*, that, as a result of habitual illegal drug use, petitioner had suffered organic brain damage, which in turn was cognizable as a mental disease or defect (*id.* at A24). Significantly, however, five members of the court of appeals doubted that petitioner's offer of proof should be read to make the additional claim discerned by the majority (see Pet. App. A35). As Judge Rubin observed (*id.* at A34-A35), the majority's broad interpretation of petitioner's claim is especially tenuous because petitioner did not argue on appeal or to the en banc court that his drug-addiction-based insanity defense should have been entertained because of any allegation that he suffered physical brain damage. In light of the position taken by petitioner in the court below, it is doubtful indeed that petitioner will be able to establish a mental disease or defect attributable to drug-addiction-induced organic brain damage. If he fails to do so it will be irrelevant whether the standard for legal insanity includes or excludes a volitional component.

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[4]Petitioner does not challenge this ruling and we are unaware of any conflicting authority.

3. Petitioner contends (Pet. 9-11) that the court of appeals' reformulation of the insanity defense will deny him due process of law, asserting that it will relieve the government of the obligation to prove the intent element of the offense charged, or will deprive the intent element of operational significance. Petitioner's conviction founders upon *Leland* v. *Oregon*, 343 U.S. 790 (1952).[5]

In *Leland* the Court upheld an Oregon statute that allocated the burden of persuasion to a defendant who raises an insanity defense and required that the defense be established by proof beyond a reasonable doubt. The Court held that the Oregon statute did not effect a denial of due process because, notwithstanding the burden of proof on the separate issue of legal insanity, the burden of proving all elements of the crime — including *mens rea* — remained with the State. 343 U.S. at 794-799. The Court also rejected the defendant's contention that a jury would be incapable of comprehending the distinction between legal insanity and lack of *mens rea* or of applying the proper burden of proof to each issue (*id.* at 800). *Leland* thus recognizes the distinction between the issues of legal sanity and *mens rea* and respects the jury's ability to carefully implement instructions making that distinction. See also *Patterson* v. *New York*, 432 U.S. 197, 201 (1977); *Mullaney* v. *Wilbur*, 421 U.S. 684, 706 (1975) (Rehnquist, J., concurring) ("[T]he existence or nonexistence of legal sanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime.").[6]

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[5]The continuing vitality of *Leland* is not open to question. See *Rivera* v. *Delaware*, 429 U.S. 877 (1976) (dismissal for want of a substantial federal question); *Patterson* v. *New York*, 432 U.S. 197, 205, 207 (1977).

[6]A claim of legal insanity based upon the volitional prong of the Model Penal Code standard simply is not the same as a claim that *mens rea* was lacking. The former, a modern formulation of the irresistible

Leland also rejects directly the claim that due process requires recognition of an insanity defense encompassing behavioral control impairments, as well as cognitive defects, resulting from mental illness. 343 U.S. at 800-801. As the Court observed, the Oregon statute adopted "the 'right and wrong' test of legal insanity in preference to the 'irresistible impulse' test" (*id.* at 800; footnote omitted). The court explained (*id.* at 801; footnotes omitted):

> [C]hoice of a test of legal sanity involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge should determine criminal responsibility. This whole problem has evoked wide disagreement among those who have studied it. In these circumstances it is clear that adoption of the irresistible impulse test is not "implicit in the concept of ordered liberty." [7]

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impulse defense, ordinarily does not deny the existence of the intent to commit a crime, but argues that that culpable intent was itself the product of mental disease. Of course, if a defendant claims that a mental disease or defect deprived him of capacity to regulate his conduct with the result that he was unable to conform his behavior to his own noncriminal intent, he suggests a lack of *mens rea* with regard to a crime. The court of appeals' decision does not alter the government's obligation to overcome any such suggestion and to do so by proof beyond a reasonable doubt in such cases.

[7]On this point, which is controlling here, the Court was unanimous in *Leland*. See *Leland*, 343 U.S. at 803-804 (Frankfurter, J., dissenting):

> The tests by which such culpability may be determined are varying and conflicting. One does not have to echo the scepticism uttered by Brian, C. J., in the fifteenth century, that "the devil himself knoweth not the mind of men" to appreciate how vast a darkness still envelopes man's understanding of man's mind. Sanity and insanity are concepts of incertitude. They are given varying and conflicting content at the same time and from time to time by specialists in the field. Naturally there has always been conflict between the psychological views absorbed by law and the contradictory views of students of mental health at a particular time. At this stage of scientific knowledge it would be indefensible to

Petitioner's claim is indistinguishable from that rejected in *Leland*. Nor can it be said that in the years following *Leland* the difficult issues implicated in the choice of a test of legal sanity have been resolved to general satisfaction. See *Powell* v. *Texas*, 392 U.S. at 536-537 (opinion of Marshall, J.). Thus *Leland* is controlling here. *Leland* also renders untenable petitioner's suggestion (Pet. 10) that *Davis* v. *United States, supra*, established that the issue of a defendant's legal sanity cannot be distinguished from the elements of the offense charged. See 343 U.S. at 797.[8]

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impose upon the States, through the due process of law which they must accord before depriving a person of life or liberty, one test rather than another for determining criminal culpability, and thereby to displace a State's own choice of such a test, no matter how backward it may be in the light of the best scientific canons. Inevitably, the legal tests for determining the mental state on which criminal culpability is to be based are in strong conflict in our forty-eight States.

[8]Petitioner also argues (Pet. 14-21) that the reformulation of the test for legal insanity may result in violation of the Eighth Amendment proscription against cruel and unusual punishment. Of course, *Leland* stands as a major obstacle to this contention as well. Nor is there any precedent for application of the Eighth Amendment to regulate the test for legal insanity. As was stated in *Powell* v. *Texas*, 392 U.S. at 531-532 (opinion of Marshall, J.), "[t]he primary purpose of [the Cruel and Unusual Punishment Clause] has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes; the nature of the conduct made criminal is ordinarily relevant only to the fitness of the punishment imposed." Moreover, petitioner's Eighth Amendment argument largely restates his due process claim under a new label. And the considerations that militate against constitutionalization of the insanity standard under a due process analysis are equally compelling in considering the application of the Eighth Amendment. See *Powell* v. *Texas*, 392 U.S. at 536-537 (opinion of Marshall, J.). Petitioner's reliance (Pet. 19-20) on *Robinson* v. *California*, 370 U.S. 660 (1962), is unavailing. There the Court struck down a statute that punished the *status* of being a narcotics addict. This case, by contrast, involves a prosecution for conduct — indeed, conduct that is not inevitably associated with a status of addiction. See *Powell* v. *Texas*, 392 U.S. at 532-533; *id.* at 549 (opinion of White, J.).

4. As petitioner contends (Pet. 12), in abandoning the volitional prong of the Model Penal Code test for insanity, the Fifth Circuit has adopted an insanity standard that diverges from the rule applied by other courts of appeals. See, *e.g.*, *United States* v. *Shapiro*, 383 F.2d 680 (7th Cir. 1967) (en banc); *United States* v. *Freeman*, 357 F.2d 606 (2d Cir. 1966); *Wion* v. *United States*, 325 F.2d 420 (10th Cir. 1963) (en banc), cert. denied, 377 U.S. 946 (1964). But none of the decisions on which petitioner relies is of recent vintage. None of the other courts of appeals has yet had an opportunity to consider or respond to recent developments upon which the Fifth Circuit's action rested — including the fact that "a majority of psychiatrists now believe that they do not possess sufficient accurate scientific bases for measuring a person's capacity for self-control or for calibrating the impairment of that capacity" (Pet. App. A26).[9]

The adoption of the Model Penal Code test for legal insanity by the courts of appeals during the 1960's reflected a belief that scientific knowledge concerning mental illness had expanded to the point that informed judgment could be made regarding impairment of behavioral controls. See, *e.g.*, *Blake* v. *United States*, 407 F.2d at 914-915; *United States* v. *Freeman*, 357 F.2d at 619-620; *Wion* v. *United States*, 325 F.2d at 425. The courts reasoned that the scope of the insanity defense should be consistent with "what is now known about diseases of the mind." *Blake*, 407 F.2d at 915. As the court of appeals emphasized (Pet. App. A29), however, subsequent experience has demonstrated that there is no adequate scientific basis for reliable application of a volitional standard, and most psychiatrists today agree

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[9]As the court of appeals was aware (see U.S. Second Supplemental Brief at 9), in response to the Psychiatric Association's statement, the American Bar Association has recently suggested dispensing with the volitional component of the insanity defense. Criminal Justice Mental Health Standards, 260-273 (Tent. Draft No. 1, 1983).

that they can be of little use in aiding juries to determine whether a criminal defendant had the capacity to control his behavior.

In view of the fundamental shift in the consensus of psychiatric opinion concerning the justification for a volitional component in the insanity defense standard, it is appropriate, at a minimum, that other courts of appeals be afforded an opportunity to reconsider the test for legal insanity, as the Fifth Circuit has done here, before any conflict warranting review by this Court is recognized. In addition, accumulation of experience in the administration of reformulated tests for legal insanity may shed substantial light upon the important question whether the pattern of verdicts returned under revised standards differs in any significant way from that which formerly prevailed (see page 5, *supra*), and may illuminate the ultimate question of the proper standard to be applied in federal courts. This Court has recognized the value of such "experimentation" in *Powell* v. *Texas*, 392 U.S. at 536-537 (opinion of Marshall, J.). And the Court in the past evidently has followed a course similar to that which we propose by withholding further review as various courts of appeals reconsidered the test for legal insanity in the wake of *Durham* v. *United States*, 214 F.2d 862 (D.C. Cir. 1954), and progressively adopted some version of the Model Penal Code formulation.[10]

Petitioner's effort (Pet. 12-14) to portray the existence of a conflict among the circuits as an equal protection problem does not require the Court to follow a different policy here.

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[10]For instance, certiorari was denied in *Wion* v. *United States, supra*; *Carter* v. *United States*, 325 F.2d 697 (5th Cir. 1963), cert. denied, 377 U.S. 946 (1964); *Feguer* v. *United States*, 302 F.2d 214 (8th Cir.), cert. denied, 371 U.S. 872 (1962); *Dusky* v. *United States*, 295 F.2d 743 (8th Cir. 1961), cert. denied, 368 U.S. 998 (1962); and *Sauer* v. *United States*, 241 F.2d 640 (9th Cir.), cert. denied, 354 U.S. 940 (1957).

The Court's rules recognize the importance of resolving conflicts among the circuits (see Rule 17.1(a)), but the existence of a conflict has never been regarded as a reason for suspending the exercise of an informed discretion in the management of the Court's certiorari docket. Cf. *United States* v. *Mendoza*, No. 82-849 (Jan. 10, 1984), slip op. 6; *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 135 n.26 (1977); *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979). Where, as here, the allegedly conflicting decisions do not stand upon a comparable footing, and do not fully illuminate the question presented, further review would "deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari" (*Mendoza*, slip op. 6).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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